

James Durham has filed a petition for rehearing asking that we address an alleged error in our memorandum decision. See Durham v. State, No. 82A04-0504-CR-175 (Ind. Ct. App. Apr. 13, 2006). We grant Durham’s petition for rehearing for the limited purpose of addressing one issue, namely, whether the trial court abused its discretion when it denied Durham’s motion to withdraw his guilty plea.¹

We reaffirm our decision.

Durham first argues that this court erred when it found that Durham had not alleged that manifest injustice resulted from the trial court’s denial of his motion to withdraw his guilty plea. Upon review of Durham’s appellate brief, we acknowledge that he used the term “manifest injustice.” Specifically, Durham confused manifest injustice with the abuse of discretion standard when he argued that the trial court’s abuse of discretion worked a manifest injustice. But the abuse of discretion standard does not apply to or cause a manifest injustice. Instead, courts must apply one of two standards when reviewing a ruling on a motion to withdraw a plea. As we noted in our decision, a trial court’s decision on a motion to withdraw a plea is reviewed for an abuse of discretion if there is no claim of manifest injustice to the defendant or substantial prejudice to the State. Ind. Code § 35-35-1-4(b). But if a party asserts manifest injustice or substantial prejudice, then the trial court’s decision is reviewed for error as a matter of law. Id. In his appellate brief, Durham confused those standards.

Again on rehearing Durham fails to differentiate the abuse of discretion standard from his manifest injustice argument when he states that his

¹ We deny Durham’s request for rehearing with regard to further revision of his sentence.

overall argument [is] that the trial court's refusal to allow [him] to withdraw his guilty plea worked a manifest injustice; for, our Supreme Court has noted that it reviews for an abuse of discretion the trial court's determination regarding whether there is a "fair or just" reason to allow a plea withdrawal or whether failure to so allow would work a manifest injustice.

Appellant's Brief on Rehearing at 3. As noted in our decision, this court applies an abuse of discretion standard to a ruling on a motion to withdraw a plea unless the defendant alleges manifest injustice or the State alleges substantial prejudice. When either manifest injustice or substantial prejudice is shown, we review the ruling for error as a matter of law.

While Durham did not separately and distinctly argue the existence of manifest injustice with regard to an insanity defense, we will address that claim here.² Durham contends that he demonstrated manifest injustice resulting from the trial court's denial of his motion to withdraw his plea because he did not know he had a valid insanity defense. Although reviewed under the more deferential abuse of discretion standard, our discussion of that claim is equally relevant in the context of Durham's manifest injustice claim. Thus, we reiterate the reasoning from our decision:

Durham need not have alleged a valid defense in order to withdraw his guilty plea. See Ind. Code § 35-35-1-4(c). On the other hand, "it is also not enough to merely assert that [a] possible defense[] exist[s] to show that the trial court abused its discretion in denying a motion to withdraw a guilty plea." Hunter v. State, 676 N.E.2d 14, 18 (Ind. 1996). In Hunter, the defendant filed a motion to withdraw his guilty plea and alleged that he had two valid defenses, namely, intoxication and insanity. This court held that the trial court did not abuse its discretion when it denied Hunter's motion to withdraw his guilty plea because Hunter had made no mention of any possible defense until months after the guilty plea hearing. Id. Further,

² In our decision we fully addressed Durham's claim of manifest injustice regarding his competency at the time of his plea and found that Durham had not shown manifest injustice. Thus, we need not address that claim again here.

there was no evidence in the record that Hunter was intoxicated or insane at the time of the crime.

Here, as in Hunter, Durham alleges that he should have been allowed to withdraw his guilty plea because he had a valid defense. But, as noted above, the mere assertion that a valid defense exists is not enough. Id. Although Durham may have had a valid claim of an insanity defense, at a progress hearing on December 10, 2004, one month before the trial date, Durham withdrew that defense despite his attorneys' advice to the contrary. In relevant part, the colloquy between Durham and defense counsel at that hearing provides:

By Mr. Banks [defense counsel]: [W]e have filed on your behalf the insanity defense.

By the Defendant: Yeah.

By Mr. Banks: And it is my recommendation and Mr. Brunner's [co-counsel's] recommendation that that defense needs to be pursued.

By the Defendant: No.

By Mr. Banks: And we have also given you the options and our opinion as to what will happen if the insanity defense is . . . is [sic] not pursued, and you need to tell the Court today . . . [sic] you've told the Court before you didn't want the insanity defense?

By the Defendant: Right, yes.

By Mr. Banks: And that's before the Court, so you need to tell the Court today whether you do or you do not want the insanity defense.

By the Defendant: I do not want the insanity defense.

By Mr. Banks: Okay.

By the Court: Even though your attorneys have told you that it's in your best interest, you still do not want the insanity defense?

By the Defendant: No, I do not want it. . . .

Transcript of December 10, 2004 Hearing at 18-19. The trial court then allowed Durham to withdraw the insanity defense.

When Durham mentioned his desire to withdraw the insanity defense the first time, his attorney requested to have his competency re-evaluated. He was then found, again, competent to stand trial. Thereafter, at the December 10 hearing, Durham repeated his request to withdraw his guilty plea. There, he stated that he had been advised that such a plea was in his best interest, but he expressly rejected defense counsels' advice to pursue an insanity defense. On these facts, that the insanity defense may have been a valid one is irrelevant.

Durham v. State, slip op. at 6-8.

We conclude that Durham has failed to show that the trial court's denial of his motion to withdraw his guilty plea caused a manifest injustice. When Durham first requested to withdraw the insanity defense, the trial court held a hearing to determine his competency. After an evaluation, Durham was determined to be competent, and at a subsequent hearing he again requested to withdraw the insanity defense. Durham was represented by counsel at all times, acknowledged that his counsel had advised against withdrawing the insanity defense, and persisted in his request to withdraw it. Durham did not then request to withdraw his guilty plea until two weeks after the plea hearing and six weeks after Durham's second request to withdraw the insanity defense. On these facts we cannot say that the trial court's refusal to allow Durham to later withdraw his guilty plea constituted manifest injustice.

We reaffirm our decision.

BAKER, J., and BAILEY, J., concur.